NO. 4140

United States
Circuit Court of Appeals
For the Ninth Circuit

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, of Norwich and London, England, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error,

and

THE NEW BRUNSWICK FIRE INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

LEO BROTHERS COMPANY, a Corporation,
Defendant in Error.

Upon Writs of Error to the United States District Court of the District of Idaho, Central Division.

BRIEF OF DEFENDANT IN ERROR.

FRANK L. MOORE,
Moscow, Idaho,
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STATEMENT OF THE CASE.

This appeal includes two actions brought by the defendant in error against the plaintiffs in error to recover upon insurance policies issued by the plaintiffs in error indemnifying the defendant in error against loss of certain property by fire.

In the lower court, the defendant in error was plaintiff and plaintiffs in error were defendants, and we will thus refer to the parties in this statement.

The actions were commenced in the District Court of the Second Judicial District of the State of Idaho, in and for Latah County and were removed to the District Court of the United States for the District of Idaho, Central Division, and by stipulation the two cases were consolidated for trial in the lower court, and for the purpose of appeal to this court. (Trans. of the Record, page 26.)

The complaints are in the usual form; that against the defendant, Norwich Union Fire Insurance Society, Limited, is found in the transcript of record at pages 1 to 21 inclusive, and that against the defendant, The New Brunswick Fire Insurance Company, a corporation in the transcript at pages 181 to 203 inclusive.

By stipulation found in the record at pages 26 to 28 inclusive, the answers of the defendants and certain exhibits and testimony deemed immaterial on this appeal, are omitted from the record.

When called for trial in the lower court, a written stipulation was entered into in each cause, that the issues of fact be tried and determined by the court without the intervention of a jury. (Trans. pages 22 and 204.)

The causes were tried and submitted on the 19th day of May, A. D. 1922, and on the 18th day of August, 1922, his Hon. Frank S. Dietrich, Judge in the lower court, made and filed his opinion, found in the transcript at pages 144 to 158 inclusive, directing judgment in each case for the plaintiff.

On the 31st day of August, 1922, the defendants jointly filed a "Motion to Suspend Entry of Judgment and for Re-Hearing," which is found in the transcript at page 158.

Thereafter, and on September 19, 1922, his Honor, Judge Dietrich, made and entered a "Memorandum Upon Defendants' Motion for Re-Hearing," found in the transcript at pages 160 to 163 inclusive, and thereafter and on the 19th day of September, 1922, made and entered judgment in each cause; that against the defendant, Norwich Union Fire Insurance Society, Limited, a corporation, is found in the transcript at pages 163 and 164 inclusive, and that against the defendant, The New Brunswick Fire Insurance Company, a corporation, is found in the transcript at pages 204 and 205.

Thereafter defendants served and filed a petition for new trial in each case; that of the Norwich

Union Fire Insurance Society, Limited, is found in the transcript at pages 166 to 169 inclusive; that of the defendant, The New Brunswick Fire Insurance Company, a corporation, is found in the transcript at pages 207 to 210 inclusive.

On the 19th day of June, 1923, the lower court made and entered its order in each case denying a new trial; these orders are found in the transcript at pages 170 and 211. Thereupon the defendants each petitioned for a writ of error to this court and an order allowing the same was given and made in each case on the 18th day of August, 1923; for the petition of the Norwich Union Fire Insurance Society, Limited, and order thereon, see pages 171 to 175 inclusive; for the petition and order in the matter of The New Brunswick Fire Insurance Company, see pages 211 to 216 inclusive. The appeal was perfected and by the stipulation found at page 226 of the transcript, the issues to be considered by this court are reduced to an interpretation of the descriptive clause in each insurance policy involved.

From the admissions made and stipulations entered into and the evidence adduced upon the trial of the causes, the following facts are fairly deducible:

The plaintiff is a corporation organized under the laws of the State of Idaho, with its principal place of business and head office in Moscow, Latah County, Idaho, and has been, and now is, engaged in the

operation of a cider and vinegar plant, and has been, and now is, manufacturing cider and vinegar at Moscow, Idaho.

The defendant, Norwich Union Fire Insurance Society, Limited, is a corporation organized under the laws of England, with its principal place of business and head office in Norwich, England, and has been, and now is, engaged in the general fire insurance business and has been, and now is, authorized to conduct its said business in the United States, and has complied with all the laws of the State of Idaho, regarding foreign corporations and fire insurance companies doing business in the State of Idaho, and has been, and now is, authorized to conduct and carry on its said business within the State of Idaho, and to make and enter into contracts of indemnity against loss by fire, and issue and deliver fire insurance policies in conformity with and agreeable to the laws of the State of Idaho, and the defendant, The New Brunswick Fire Insurance Company is a corporation organized under the laws of New Jersey, with its principal place of business and head office in New Brunswick, New Jersey, and has been, and now is, engaged in the general fire insurance business, and has been, and now is, authorized to conduct said business in the United States, and has complied with all the laws of the State of Idaho, regarding foreign corporations and fire insurance companies doing business in the State of Idaho, and has been, and now is,

authorized to conduct and carry on its said business within the State of Idaho, and to make and enter into contracts of indemnity against loss by fire and issue and deliver fire insurance policies in conformity with and agreeable to the laws of the State of Idaho. (See Paragraph I and II of the complaint found at page 1 of the transcript; Paragraphs I and II of the complaint found at page 181 of the transcript; and "Stipulation Re-Printing of Record" found at pages 226 and 227 of the transcript.)

That at all times in the complaints mentioned, Fred Veatch and M. J. Veatch have been co-partners doing business at Moscow, Latah County, Idaho, under the name and style of Veatch Realty Co., and that said co-partnership has been engaged in the business of writing fire insurance. (See testimony of Fred Veatch, transcript, page 30.) Veatch Realty Co. has been agent of the defendants for the writing of fire insurance policies for a number of years. (See testimony of Fred Veatch, Trans. pages 30 to 31 inclusive.)

The vinegar plant of Leo Bros. Company, a corporation, is situated in Moscow, Idaho, on the east side of Main Street between "A" and "C" Streets, on the southeast corner of the intersection of "C" and Main Streets, and the company has been operating a vinegar factory at this location since 1913, and was the owner of the premises on the 21st day

of December, 1920, and had been the owner of the premises at all times up to the trial of the cases in the lower court. (See testimony of Fred Veatch, Trans. page 31.)

On the 21st day of December, 1920, the Veatch Realty Co. issued a policy of insurance in the name of the defendant, Norwich Union Fire Insurance Society, Limited, of Norwich and London, upon property of the plaintiff, Leo Brothers Company, and on the 28th day of July, 1920, the co-partnership of Veatch Realty Co. wrote an insurance policy upon property of Leo Brothers Company, for the defendant, The New Brunswick Fire Insurance Company (see testimony of Fred Veatch, Trans. pages 31 to 33 inclusive and the policies, Exhibits "A," one found at page 6 of the transcript and one found at page 187 of the transcript), and the plaintiff paid the premium on these policies (see Paragraph VII of each complaint and stipulation found at page 34 of the transcript).

The descriptive clauses of these policies relating to the property covered and its location are not materially different. They were prepared in triplicate upon printed blank riders furnished by the defendants and when filled out the original was pasted on the face of the policy, a copy was pasted to the daily report that went to the office of the Company and the third was retained by the issuing agent. (Trans. pages 48 to 50 inclusive.)

The Norwich Union clause, briefly, is as follows:

> "On the following described property, all situate at No. 244 on the east side of Maine Street, between "A" and "C" Streets in Moscow, Idaho.
>
> 1. $5,000.00. On merchandise of every description, consisting principally of cider vinegar manufactured or in process of manufacture, and all materials for manufacturing same * * * all only while contained in the three story comp. roof brick & one story frame building, and its additions (if any) of like construction communicating and in contact therewith, situate No. 244 on the Southeast corner of Main & "C" Streets in Moscow, Idaho."

At the bottom of the policy after the date line, and above and to the left of the signature of the issuing agent, are notations under the printed headings:

> "Insurance Map"
> "Sheet . . . "
> "Block . . . "
> "No. . . . . "

so that the same reads as follows:

> "Insurance Map"
> "Sheet 4"
> "Block 102"
> "No. 244."

(See Exhibit "A", pages 7 to 9 inclusive of the transcript.)

The descriptive clause in the policy of the de-

fendant, The New Brunswick Fire Insurance Company, is as follows:

> "On the following described property, all situate No. 244 on the south-east corner of Main and "C" Streets in Moscow, Idaho.
> $6,000.00. On merchandise of every description consisting principally of cider vinegar manufactured or in process of manufacture and on material for manufacturing same, etc. * * * all only while contained in the three story comp. roof brick & one story frame building, and its additions (if any) of like construction, communicating and in contact therewith, situate as above."

At the bottom of this policy, and after the date line and to the left of the signature of the insurance agent, are the following notations under the printed headings:

"Insurance Map,
Sheet 4,
Block 102,
No. 244."

(See Exhibit "A", Trans. pages 187 to 190 inclusive.)

The descriptive clause in each of these policies as they relate to the location of the property insured were written with reference to the insurance map referred to in each of the policies. (Testimony of Fred Veatch, Trans. pages 37 and 38.)

This map referred to and identified as Sanborn's Fire Insurance Map of the City of Moscow, in force

at the time these policies were written, was admitted in evidence and marked Plaintiff's Exhibit No. 3. (See Trans. page 38.) Page 4 of the same, whereon the plant of the vinegar factory of the plaintiff is shown was also identified and admitted in evidence as plaintiff's Exhibit 3-A. (See Trans. page 38.) A copy of plaintiff's Exhibit 3-A is also found at page 229 of the transcript.

A fire occurred upon the property of the plaintiff on the 6th day of July, 1921. (Testimony of Fred Veatch, Trans. page 34.) The fire started on the property located at No. 224, according to the Sanborn Fire Map, in an old barn, which did not belong to Leo Brothers Company, and which was being used by a Highway District. This fire communicated from the barn to the property of Leo Brothers, and the damage was done to vinegar contained in tanks in that part of the building owned by Leo Brothers Company and marked "Vinegar Tanks" on plaintiff's Exhibit 3-A, found at page 229 of the transcript. (Pages 39 and 40 of the transcript.) The loss was approximately 130,000 gallons of vinegar and there was $31,000.00 insurance thereon, including the amounts of the policies in controversy. (Trans. page 40.)

Notice of the fire and proofs of loss upon the policies before the court, were made according to the conditions contained in the policies (Trans. page 42). No part or portion of the loss under

either of the policies has been paid. (Trans. page 43.)

Fred Veatch was the principal stockholder and manager of the plaintiff but the officers of the defendants knew this and do not contend for any nonliability on the ground that Mr. Veatch, when the policies were written, owned an interest in the property insured. (See Trans. page 95.)

The entire structure designated on the insurance map, plaintiff's Exhibit 3-A, as "Vinegar and Cider Factory" and "Vinegar Tanks" and "Vinegar Storage" are all used together in the manufacture of vinegar and cider. (See the testimony of Fred Veatch, Trans. pages 92 and 93), where the witness explains the process of manufacturing cider vinegar and shows the connection of the various parts of this building by a common use in the manufacture of vinegar products. These parts are also physically connected. (See Trans. page 92, testimony of Joseph M. Kimberling, Trans. pages 116 to 120 inclusive, and plaintiff's Exhibit 3-A, Trans. page 229.)

The Board of Underwriters of Insurance have prescribed specific rates upon all insurable property in this Block 102 (see defendant's Exhibit No. 7, Trans. page 231). In this exhibit by line numbered 2, under the heading "No. of Rating," the specific rate for the vinegar factory of the plaintiff is $2.50 per hundred on building and contents.

There is an error in this exhibit as printed in the record. The first $2.50, after the words "Vinegar Factory" in line 2, should be under the heading "Bldg." for building, and the second $2.50 should be under the heading "Contents" instead of Cents. In other words, the building and the contents of the building take the same rate of insurance. (See Trans. page 150 for correct copy.) The third line of this exhibit designates the specific rate on the part of the building marked "Vinegar Tanks" on plaintiff's Exhibit 3-A, and contents of the same at $2.45 per hundred (Transcript of Record, page 53).

The witness Veatch for some time, in writing insurance at the reduced rate on the vinegar tanks and contents, had used "No. 240" to designate the location of the insurance. This number was used for his own convenience in cancelling policies upon contents of the vinegar tanks, as the vinegar was sold and shipped out. (See Trans. pages 99 and 100.) There is no number 240 on the insurance map, nor in the rating book.

The plant of the plaintiff, as an insurance risk is known as a special hazard among the insurance people, because it is a manufacturing plant, and when reports covering a special hazard are sent into the companies, the matter is immediately referred to special agents who make inspection of the property insured, both as to its physical and moral hazard. (Testimony of Witness Veatch, pages 100,

110 and 111.)

When insurance was written upon this plant and reported at the rate of $2.50 per hundred, the insurance company receiving the report would know that the insurance covered the entire plant, and when the rate of $2.45 per hundred was reported, the company or the officers thereof having the matter in charge would know that the insurance related to that part of plaintiff's plant specified on the insurance map as "Vinegar Tanks," by a reference to the rate book. (Trans. page 109, 111, 112.)

The specific rates at Moscow, contained in the book of specific rates, of which defendant's Exhibit 7 (Trans. page 231), is page 3, are subject to the rules as provided for in the book of Tariff Rates and Rules. (Defendant's Exhibit 18.) (Testimony of John K. Wooley, Trans. page 130.)

In order to write insurance on two or more buildings, which may be specifically rated, it is necessary to adopt either the average or distribution clause or the ninety or one hundred per cent reduced rate average clause, as provided by the rules on page 12 of Tariff Rules, found in defendant's Exhibit 18, or by writing the policy at the highest rate applicable under Rule 4, found at page 4 of Tariff Rules, in defendant's Exhibit 18.

POINTS AND AUTHORITIES.

I.

The record raises no questions open to review by

this court, and the judgment of the lower court should be affirmed.

Revised Statutes, Secs. 649 and 700.

Section 291 of the Judicial Code.

British Queen Mining Co. of Colorado vs. Baker Silver Mining Co., 139 U. S. 222; 11 Sup. Ct. Rep. 523.

Grayson vs. Lynch, 163 U. S. 472; 16 Sup. Ct. Rep. 1064.

City of St. Louis vs. Western Union Tel. Co., 166 U. S. 388; 17 Sup. Ct. Rep. 608.

Chicago G. W. Ry. Co. vs. Minneapolis St. P. & S. S. M. Ry. Co., 176 Fed. 237.

First Nat'l Bank of Bayonne vs. Anglo-South Amer. Bank, 230 Fed. 817.

Bundy vs. Huntington, 224 Fed. 847.

Ladd, Etc., Bank vs. Lewis A. Hicks Co., 218 Fed. 310.

Phoenix Securities Co. vs. Dittmar, 224 Fed. 892.

II.

A policy of insurance should be construed according to the plain, ordinary and usual meaning of the language used to carry out the intention of the parties as gathered therefrom.

Arkansas Ins. Co. vs. McManus, 110 S. W. 797, Ark.

Palatine Ins. Co. vs. O'Brien, 68 Atl. 484, Md.

French vs. Fidelity & Casualty Co., 115 N. W. 869, Wis.

Wisconsin Zinc Co. vs. Fidelity & Deposit Co., 155 N. W. 1081, Wis.

III.

Fire insurance policies, as other contracts, should be reasonably interpreted in accord with the apparent object and intent of the parties.

German-American Ins. Co. vs. Messenger, 136 Pac. 478, Colo.

Hocking vs. British-American Assur. Co., 113 Pac. 259, Wash.

IV.

A policy, like other contracts, must be construed from the language used, and when the terms are plain and unambiguous, the court should hold the parties thereto.

Laventhal vs. Fidelity & Casualty Co., 98 Pac. 1075, Cal.

Puget Sound Imp. Co. vs. Frankfort Marine Accident & Plate Glass Ins. Co., 100 Pac. 190, Wash.

V.

Policies of insurance, like other written contracts, will be construed with a view of carrying out the intention of the parties.

Jennings vs. Brotherhood Acc. Co., 96, Pac. 982, Colo.

Cutting vs. Atlas Mut. Ins. Co., 85 N. E. 174, Mass.

VI.

Where there is no doubt as to the meaning of a

contract there is no room for construction.

E. H. Stanton Co. et al, vs. Rochester German Underwriter's Agency, 206 Fed. Rep. 978.

Dover Glass Works Co. vs. American Fire Ins. Co., 29 Atl. 1039.

Hurt vs. Monumental Mercury Mining Co., 35 Idaho, 295.

Lathers vs. Mutual Fire Ins. Co., 116 N. W. 1.

VII.

Where the subject of insurance is described as a building, the entire structure composed of several parts, is included, if the parts are so joined as to be used as one, and devoted to the same common purpose.

Pettit vs. State Ins. Co., 43 N. W. 378, Minn.

Gross vs. Milwaukee Mechanics Ins. Co., 66 N. W. 712, Wis.

Still vs. Connecticut Fire Ins. Co., 172 S. W. 625, Mo.

Henry Clay Fire Ins. Co. vs. Crider, 229 S. W. 128, Ky.

Prussian Nat. Ins. Co. vs. Terrell, 135 S. W. 416, Ky.

Violette vs. Queen Ins. Co., 165 Pac. 65, Wash.

VIII.

Error in rates does not effect contractual rights arising out of insurance policies.

National U. S. Fire Ins. Co., et al, vs. John

Spry Lumber Company, 85, N. E. 256, Ill.

IX.

The doctrine that an insurer may waive its right to insist that the rights of the insured have been forfeited extends to practically every ground for denying liability.

Knickerbocker Life Ins. Co. vs. Norton, 96 U. S. 234.

Dover Glass Works Co. vs. American Fire Ins. Co., 29 Atl. 1039, Del.

X.

Inferences may arise only from facts established by evidence and can never be made to subserve the primary functions of evidence.

Swetland vs. New World Life Ins. Co., 35, Idaho, 109.

Beazley vs. McEver, 238 S. W. 949, Tex.

ARGUMENT.

The opinion of his Honor, Judge Dietrich, which is found in the Transcript of Record, beginning on page 144 and ending on page 158 and his "Memorandum Upon Defendants' Motion for Re-Hearing," beginning on page 160 of the transcript, disclose such a fair, complete and comprehensive consideration in the trial Court, of the contentions of the appellants in error, that an argument upon our part seems a work of supererogation.

We will therefore limit our discussion to issues arising since the trial of the causes and to those issues of fact not discussed by Judge Dietrich.

Our first contention is, that the record of these causes, presents no questions to this court, which are open to review.

Section 649 of the Revised Statutes provides that issues of fact in civil cases in the Circuit Courts of the United States may be tried and determined by the Court without the intervention of a jury, by the parties filing with the Clerk a stipulation in writing, waiving a jury. The finding of the court upon the facts which may be either general or special shall have the same effect as the verdict of a jury.

Section 700 is as follows:

> "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court, without the intervention of a jury, according to Section Six Hundred Forty-Nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a Bill of Exceptions, may be reviewed by the Supreme Court upon a Writ of Error or upon appeal, and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the Judgment."

The foregoing provisions of the Revised Statutes are retained and made applicable to Law actions tried in the District Courts by Section 291 of the

Judicial Code, which provides in substance, that wherever in any law not embraced within the act, any reference is made to, or any power or duty is conferred or imposed upon the Circuit Courts, such reference shall upon the taking effect of the act be deemed and held to refer to and to confer such power and impose such duty upon the District Courts.

It follows then that only when the findings of the court are special may the review of the appellate court extend to a determination of the sufficiency of the facts found to support the judgment, and if the finding is general, then the sufficiency of the evidence will not be considered for the purpose of disturbing or reviewing the judgment.

In each case at bar the finding is general. There are no special findings, nor did the plaintiffs in error, or either of them, ever at any time present to the court for consideration, special findings upon any issues of fact involved. The nearest either came to presenting special findings is shown at page 141 of the transcript of the record from which we quote:

> "MR. DAVIS: The defendant rests, Your Honor. I am not quite familiar with the practice where the case is tried without a jury, but the defendant asks the court to make findings in favor of the defendant, special findings, finding facts in favor of the defendant, and asks leave to present proposed findings."

But at no time thereafter did the defendants request or suggest findings, either in their briefs or petition for re-hearing or otherwise, nor did they ever present a desired or proposed finding upon any point or issue, or remind the court of the foregoing suggestion made in the course of the trial. Neither does the record contain any exceptions to the rulings of the court made in the progress of the trial of the causes. It is true that the appellants in error each petitioned for a new trial and that the court denied such petition, but no exception was taken to such ruling.

In the case of British Queen Mining Co. of Colorado vs. Baker Silver Mining Co,. 139 U. S. 222, this question was fairly before the Supreme Court of the United States upon a record on all fours with the record in the cases at bar, and the Court speaking through Fuller, C. J., lays down the rule as follows:

Where the record contains a Bill of Exceptions, but no exceptions to the rulings of the Court, in the progress of the trial of the cause, were thereby duly presented and, although after reciting the evidence, it is therein stated that "The court thereafter and during the said term made the following Findings of Fact and Judgment thereon," which is followed by an opinion of the Court assigning reasons for its conclusions, this cannot be treated as a special finding, enabling the Court to determine whether the facts found support the Judgment nor

can this general findings be disregarded. In such case the record raises no questions open to revision by the Supreme Court.

We, therefore, most respectfully submit that no error upon the part of the trial court is saved for consideration by this court.

An examination of the specifications of error assigned by plaintiffs in error, as found in the transcript at page 172 to 174 inclusive and 212 to 215 inclusive, and pages 13 to 15 inclusive of their brief, suggests to us that counsel for plaintiffs in error are undertaking to treat the decision of the lower court as special findings. They should not be permitted to do this, because it has never been held in the Federal Courts that an opinion of the trial judge, setting forth the reasons for his decision in an action at law tried by a Federal Court without the intervention of a jury can be regarded as special findings within the meaning of the statute and where following such opinion, judgment is ordered for plaintiff, as in the case at bar, the finding is always considered general.

Assignment No. II was waived, as disclosed by the record at page 122, where counsel for plaintiffs in error says:

> "MR. DAVIS: The plaintiff having rested, your Honor, the defendant moves the court to enter judgment for the defendant upon plaintiff's own case, that he is not entitled to recover. There are matters which I wish to argue in brief.

THE COURT: I think I will not entertain argument unless you are willing to stand upon the motion.

MR. DAVIS: All I have is just an expert here; he just stepped out in the hall; if we can wait a few minutes Mr. Webster might take the stand and give us his testimony as to—

THE COURT: Do you want your motion disposed of now?

MR. DAVIS: No, the court did not want to hear argument."

Therefore, at the request of plaintiffs in error, there was no ruling by the court upon their motion for a non-suit.

The Third Assignment of Error is:

"In denying defendants' motion for judgment at the close of the entire case."

The only record upon which this assignment can be predicated is found at page 141 of the transcript and is as follows:

"MR. DAVIS: The defendant rests, your Honor. I am not quite familiar with the practice where the case is tried without a jury, but the defendant asks the court to make findings in favor of the defendant, special findings, finding facts in favor of the defendant, and asks leave to present proposed findings."

This never was considered by any party connected with the trial of the cause as a motion for judgment at the close of plaintiff's case, and the very most that can be claimed for the proceeding is

that it was a request to be permitted to present to the court proposed findings and as the record shows at the same page that no proposed findings were ever presented, nor was any further suggestion made to the court that the plaintiffs in error desired special findings upon any issue of fact involved, we are at a loss to understand why plaintiffs in error undertake to predicate any rights in this court upon this assignment of error.

The same may be said of Assignment of Error No. IV. The request of counsel at the close of the entire case we have quoted above, but the record continues:

> "But at no time thereafter did the defendants request or suggest findings, either in their briefs or petition for re-hearing, or otherwise, nor did they ever present a desired or proposed finding upon any point or issue, or remind the court of the foregoing suggestion made in the course of the trial."

Certainly, no refusal of the court to make special findings upon any issue of fact involved is shown by this record.

Assignment No. V is equally without merit, because each judgment for the defendant in error was entered upon a general finding upon conflicting testimony.

The same is true of Assignments No. VI, VII, VIII, IX, and X.

There being then, no Bill of Exceptions to the

rulings of the court made during the trial of the causes; there being no special findings of the trial court, and no showing that any request for special findings was made to and refused by the trial court upon which error can be predicated, it is thought that the only authoritive action for this court is an affirmance of the judgment of the trial court.

Counsel in their argument, beginning on page 15 of their brief and ending in the last paragraph thereof, persistently stress the Number 240, as pertaining to a description of that part of the premises involved, designated on the insurance map as "Vinegar Tanks." This is misleading and there is no justification for it.

There is not a scintilla of evidence to show that this No. 240 was ever at any time known to or considered by the insurance companies for any purpose, or by any person or agent connected with the companies, other than the witness Fred Veatch, who fully explains the use of this number, at page 99 of the transcript where he says, in answer to questions by the court:

(Questions by the court.)

"Q. How does it happen that you fixed this No. 240?

A. If I can have that old map, I can explain it to you, that 1909, I think it is. Now as I say when we started in we put up a small shed building, and we had, I think—we put up a small shed on the south side of our ground and put in three tanks only; that shed was

boarded up on this side and on this side.

Q. Yes, I understand that; you testified to that in substance before. I mean how did you happen to hit upon this No. 240?

A. I figured out the way the city numbered it, about the distance between this number and that number and I put on there for my own convenience No. 240, and inadvertently on one policy, which was renewed, which was written I think first in 1913 or 1914 that was renewed every year just the same, I used that 240 on my specific insurance and have done it right straight along, covering the juice, for my own information. When the stock begins to run down I begin to cancel out my specific insurance, as it leaves this tank for the last time, as it is shipped, and I used that 240 merely to keep from looking through my records to show just the specific insurance that I wanted to cancel out."

This No. 240 was not upon the Sanborn map for any purpose whatever, neither was it in the Book of Specific Rates, as they pertain to the manufacturing plant of the defendant in error.

An examination of pages 99 to 104 of the transcript discloses that Judge Dietrich during the trial was at a loss to understand how the insurance companies would know that insurance written upon the property of Leo Brothers Company would cover the entire plant or would be limited to the "vinegar tanks" alone, and this is explained by Veatch at page 109 of the transcript where he was asked the question:

"Q. Assuming, Mr. Veatch, that you write a blanket policy with an insurance company on vinegar contained in the buildings of the plant, at a rate of 2.50; you also write a policy for specific insurance upon vinegar in the tank sheds at the reduced rate of 2.45; you make your report to the company covering the same property as described by the Sanborn Fire Map, and in that report you show the rates for the blanket insurance or the rate rather for the blanket insurance and the rate for the specific insurance, how would the company know what property it was insuring under its separate contracts of insurance.

A. The rate book would indicate that."

We respectfully submit, that if, as he testified, his reports to the companies showed the descriptive clause of the policy and also showed the rate of insurance, the company or the proper officers of the company could readily understand that the higher rate of $2.50 per hundred carried insurance upon vinegar in any part of the plant, wherever it might be located, and that the policies carrying the lower or $2.45 rate, would cover vinegar or vinegar products only when or while located in the "vinegar tanks" in the tank shed.

With the rule of law quoted by counsel in their brief, at the bottom of page 17, we have no contention whatever, but the witness Veatch tells us, as we have shown above, how the plaintiffs in error could have known that the property insured by these two policies was covered in any part of Leo Brothers Company manufacturing plant, and there

is not a scintilla of evidence to show but that the representatives of the company so understood the provisions of the policy.

The witness Veatch further testified and it is undisputed, that in every instance of writing a policy upon this plant, because it was a special hazard under the insurance rules, special agents were sent by the companies whose policies had been reported as covering the plant, to make a full investigation and examination of the property, as to its moral and physical hazard. If these special agents of the plaintiffs in error did this, and Veatch says they did, and there is no evidence showing that they did not, then they came to Moscow, saw the physical connection of the several parts of this plant, saw and understood that it was a manufacturing plant, saw and understood that the parts designated upon the insurance map as "Vinegar Tanks" were used in connection with the other parts of the plant in the manufacture of cider and cider vinegar. If this be true, and there is not a scintilla of evidence to dispute it, then the contention of plaintiffs in error, as exhibited in their brief, is nothing but a mere quibble.

With the authorities cited by counsel for plaintiffs in error on pages 18, 19 and 20 of their brief, we have not the least contention or criticism. Each case which we have read only recognizes the rule that where property is insured in a specific location, *and not elsewhere,* and during the time that the

policy of insurance is in force, such property is removed from the location where it is insured to some other location and is there destroyed, the insurer is not liable.

This principle of law is not involved in the instant cases, because there is no issue that the vinegar was insured in one place and removed to another. The evidence is that in the course of its being manufactured, the vinegar and vinegar products went from one compartment or room of this manufacturing plant to other rooms or compartments of the same, and that the entire plant was all one building by physical connection and by use for a common purpose, and there is not a scintilla of evidence to the contrary.

On page 20 of their brief, counsel say:

> "This slight physical connection of the two buildings could hardly constitute the smaller an addition. However, this point is not material for regardless of the physical features, the undisputed evidence by plaintiffs own admissions is, that the parties agreed and considered these two structures as separate locations or risks and regarded them as distinct and separate buildings or subjects of insurance."

This statement is absolutely without any foundation of fact or inference from any testimony in the record. The entire record shows that for years and years Leo Brothers Company, through Spottswood & Veatch, and through the Veatch Realty Company, has been obtaining insurance upon this vinegar

plant with the intention and thought that specific insurance was the only way to write insurance thereon,

At the bottom of page 89 the following proceedings were had:

"MR. DAVIS: Q. Now when there is a rate, a specific rate fixed by the Board of Fire Underwriters, which is communicated to you, that is the rate that you must use, is that not correct?

A. Yes, sir.

Q. And that rate applies to the entire risk, does it not?

A. Yes, sir, it is supposed to apply to that entire risk.

Q. And when a rate is fixed, identifying a risk, that identifies the specific risk, does it not?

A. It is supposed to, yes.

Q. Now then, explain how, where you have two rates or two separate risks. you can write the two different risks under one coverage, at one separate rate.

A. That rate sheet there that you have in your hand, Mr. Davis, of course, says next south Vinegar tanks. Our heavy values nine or ten months out of the year are in those tanks, and that part of the time I carried a certain amount of specific insurance under the $2.45 rate. It is impossible for us to carry an average clause down there, because that vinegar is shifting practically every day from one building to the other. one part of the building to the other. There is no means of bookkeep-

ing that we could put in down there that we could keep track of the vinegar that would be in part of that building one night and what was there the next night, without making the actual inventory and measurement, and we have always carried a certain amount of specific insurance on those, and as the stock went down, we would cancel out on that stuff.

MR. MOORE: Under the two forty-five rate?

A. Under the two forty-five rate, yes, sir.

MR. DAVIS: Then the insurance that was written which describes 240 was specific on the vinegar tank shed, is that correct?

A. On the contents of the vinegar tanks, yes, sir.

Q. Now again referring to the word "south" that you speak of. On this rate manual, south, first, southeast corner of Main and "C" Streets, 244?

A. Yes, sir.

Q. Then there is "South"?

A. Yes, sir, no number.

Q. Then there is another south 244 (this should be 224—See Defendants' Exhibit 7, trans., page 231).

A. Yes, sir.

Q. Is it not a fact that that rate schedule refers to separate risks, each one separate?

A. I don't understand it so, no, sir.

Q. You did understand it so, though, when you applied took the two forty-five rate for one and a two fifty rate for another, did you not?

A. No, sir, I did not. I understood that I

could write specific insurance at that rate on that, and then write blanket insurance to cover the—

Q. Does this rate manual tell you what to do in regard to it?

A. I wouldn't be positive, I wouldn't say until I can read it and refresh my memory on it.

Q. Isn't it a fact that if you are using a general coverage that you must average your rate?

A. I don't understand so.

Q. Or apply for a specific rate for the entire building from the Board of Fire Underwriters?

A. I don't understand so, no.

Q. Then Mr. Veatch, let me read this from your testimony in the former trial: I said: 'And where there is a fixed rate for a certain risk that applies to the entire risk?' 'I think that is correct, I think there are some exceptions to that rate.' 'You are referring to the average clause, but you have never used the average clause in writing this particular kind of a risk?' 'No, sir.' 'The average clause has no bearing on this particular kind of case?' 'No, sir.' 'You identify to your principal the particular insurance you desire or that you are binding them with, as a single particular risk in all cases? In other words, you never write two separate risks at separate rates in one policy?' 'No, sir.' 'That cannot be done, according to your rules or the rules of your principals?' 'I don't think so. I have never done it anyhow, or attempted to do it.' That was your testimony in the former trial, was it not?

A. Yes, sir, and that is still correct.

Q. That was your belief at that time and that is your belief now?

A. It is my belief now, yes, sir."

Now we respectfully submit that, considering all of this testimony, and it is undenied, and was brought out on cross examination, the only reasonable conclusion is that it was the intention of the witness Veatch to write specific insurance upon vinegar contained in any part of the manufacturing plant of the defendant in error. He wrote it at only one rate; he wrote it as only upon one risk. It cannot be argued for a single moment that the policies in controversy cover two risks at two separate rates. The risks covered by the policies are vinegar and vinegar stock situated anywhere within the manufacturing plant of Leo Brothers Company. It is not specific insurance on vinegar in the "vinegar tanks" at the reduced rates.

In the testimony of the witness Veatch, quoted at pages 23 and 24 of the brief of plaintiffs in error, nothing can be deduced except that the witness, Veatch, wrote policies at times on the entire manufacturing plant and contents at the 2.50 rate, and at other times he wrote policies on the vinegar tanks and the contents thereof, as a separate risk at the rate of 2.45. He testified that he knew that he had no authority to change rates and admits that when he wrote this latter class of insurance, that is, on the contents of the "vinegar tanks" at the 2.45 rate,

he described the rate as line 3, page 3 of the Book of Specific Rates for Moscow, and the conclusions drawn by counsel in their brief from this testimony are not justified. They say:

> "It showed that he knew and understood 240 (this is the vinegar tanks and the vinegar tank shed) to be a separate subject of insurance from 244."

and this is true. If Leo Brothers Company desired specific insurance at the reduced rate or at the 2.45 rate, that insurance was limited to the tank shed and the tanks therein and the contents thereof. There can be no quibble about this, and if Leo Brothers Company so desired they could insure the buildings of the entire plant, the machinery of the entire plant and the contents of the building or buildings, as we may choose to call it, of the entire plant, as one risk or one hazard, at the rate of 2.50.

We fail to understand how counsel get any consolation from the case of Stanton et al. vs. Rochester German Underwriters Agency, 206 Fed. 978. They say:

> "In that case there was but one entire building, broken up into several compartments. The policy provided that the insurance should attach to each of these buildings and contents in certain proportions. The contention was made that inasmuch as there was but one building, this clause could not be applied."

Then quote from the opinion of Judge Rudkin

who tried the cause in the lower court, and we respectfully insist that if, by the contract of insurance one building is broken up or divided into several compartments for purposes of insurance, then the contract must prevail and the converse is equally true. If the several parts of one building may be insured at different rates, by making specific insurance upon each compartment or its contents, then the parties may agree that the entire building may be insured at one rate or at any rate and may agree that the entire buildings be treated as one risk. This rule of law announced by Judge Rudkin means nothing more or less than this: Parties may agree that the several apartments of one building may be treated as separate hazards and insurance may be written upon the contents thereof as separate risks, or that the parties may agree that insurance may be written upon one building at any particular or specific rate.

In the instant case, the conduct of Veatch in writing these policies of insurance does not mean, nor can the conclusion be drawn, that he undertook to change rates or to increase the liability of the plaintiffs in error in any particular. It shows that he treated the entire plant as one building and assumed that he had the right to insure the contents of any or every part of the building at the highest rate carried by any compartment of the building. It also shows that he believed or assumed that he had the right to write specific in-

surance at a lower rate on that part of the building designated as "Vinegar Tanks" or the vinegar tanks therein, and all vinegar or vinegar products therein contained.

We contend, and are undertaking to show that the rule approved by Judge Rudkin is that insurance is a mere matter of contract and that parties to such contracts bind themselves according to the plain, unambiguous provision thereof. We are not contending, nor have we ever contended, that the provisions of the contract in the Stanton case are identical with the terms of the contracts at bar, but that the rule announced there applies to the cases before the court.

If the conditions contended for by plaintiffs in error existed at this vinegar plant of Leo Brothers Company, it would have been the next thing to impossible for Leo Brothers Company to have had insurance written upon their vinegar or vinegar products so that they could have had protection thereon, because if the vinegar should have been insured in that part of the building designated as "Vinegar Tanks" and then in the process of being manufactured, it was removed to the north part of the building, while there it would have been uninsured. On the other hand, had they insured vinegar in the north part of the building and it had been removed to the vinegar tanks, and there was a loss there, the company would have had no insur-

ance, and the only way it could carry insurance and protect itself would have been to write insurance upon vinegar while situated in any part of the plant and to do this it must write at the highest rate of insurance fixed on the entire plant and contents, or the 2.50. But when the process of manufacturing was completed, and it became nothing but a matter of storage and removal of the vinegar then large quantities of the vinegar, as the witness Veatch put it:

> "Our heavy values nine or ten months out of the year are in those tanks." (Transcript page 90-102-106.)

The companies had given defendant in error a special rate of insurance upon the same while contained in the tanks and Veatch wrote specific insurance under the special rate. (Trans. page 90.)

The understanding and intention of the witness Veatch in writing this insurance is clearly expressed in his testimony, given on cross examination and quoted on page 30 of the brief of plaintiffs in error. Counsel start out with the question:

> "You are familiar with the rule for applying co-insurance reduced rate average clause."

(The contract in the Stanton case embodied the provision for insurance under the co-average clause and applies only as we understand it to two or more separate or distinct insurance risks or hazards.)

The witness answers "Yes", and ends with the question at the bottom of the page:

> "Q. That is the only way that they could be covered under one coverage?"

And the witness answers:

> "If they were two buildings that would be true, yes."

The only conclusion deducible from this quotation is that Veatch was familiar with the rule for applying the coverage clause, and that in his opinion it applied only where there were two buildings covered by one policy.

These policies before the Court were written at the highest rate applicable to the entire manufacturing plant. No effort is made to obtain the benefit of a reduced rate.

On page 31 of their brief, counsel say:

> "And later when his counsel had switched to this position of blanket coverage, he says,
> Q. Mr. Veatch you have these rate books which are your only instructions. Will you find in there any place that authorizes the writing of blanket coverage where there are two specific rates given by the rating Bureau?
>
> A. I don't think I could in any limited time; I don't know whether I could at all or not.
>
> Q. You are not familiar with any such rules as authorize that anyway?
> A. No, sir."

Counsel then refers to the testimony of one Wooley and refers to page 130 of the transcript. An examination of the transcript at this citation, will disclose that the witness Wooley gave no such testimony. The question asked Wooley was as follows:

> "Now referring to the specific rates at Moscow, and your rules as promulgated there, tell me whether or not, where there are two risks specifically and separately rated, such as line 2 and line 3 of this book, whether it is possible, and to conform to the rules of the company, for an agent to write both risks under one coverage at one rate."

And Mr. Wooley answers:

> "In the first place, the book of specific rates states that the specific rates in the book applying to the different risks are subject to the rules as provided for under the other book (the other book is defendants' Exhibit 18). In the other book it states that insurance may be issued only covering a specific amount on building, a specific amount on machinery, tools and fixtures, a specific amount on stock in the building. Other than that, in order to write insurance on two or more buildings which may be specifically rated, it is necessary to adopt either the average distribution clause or the ninety per cent reduced rate average clause, which is accepted for blanket purposes, in lieu of the average distribution clause.
>
> Q. Now in other words the only way that you can write insurance under those conditions is by using the reduced rate average or the co-insurance clause?

A. And the highest rate applicable."

This is just exactly what Veatch did in writing this insurance for the defendant in error. He wrote the policy upon vinegar situated at any place within the building occupied by the plant at the highest rate applicable, $2.50 per hundred.

The next question and answer are almost farcical:

> "Q. You have to use all three of these to make a blanket coverage and if they are not used there could not be a blanket coverage according to the rules?
>
> A. There could not be a blanket coverage."

Now neither the witness Wooley nor counsel will contend that to write a blanket policy, as it is understood in the insurance business, the reduced rate average clause and the co-insurance clause, and the highest rate applicable must be united. The truth of the matter is, that when the witness Wooley answered the following question of counsel as he did:

> "Now in other words, the only way that you can write insurance under those conditions is by using the reduced rate average or the co-insurance clause?
>
> A. And the highest rate applicable."

Counsel for plaintiffs in error were astounded, because this is just exactly what the witness Veatch had done in writing the policies involved here. He had intended to cover vinegar and vinegar

stock in any part of the manufacturing plant wherever it might be, and had written the policy at the highest rate applicable.

This rule for writing policies at the highest rate applicable is found at page 4 of the Tariff Rules, contained in defendants' Exhibit 18, and is as follows:

> "When two or more buildings (used for any of the purposes described in the list below) adjoining or adjacent, are occupied by the same person or firm for a common purpose, so that the buildings, although separated, virtually constitute a single hazard, they need not be charged for as exposures to each other, provided the highest basis rate of any of the buildings so adjoining or adjacent to each other is made the basis rate for each one of said buildings, according to its class, whether B, C or D; otherwise each building taking its proper basis rate in accordance with the rule for determining rate of premium must be subject to the charge for exposures as per the tables of exposures."

One of the lists referred to by the explanation above in parenthesis, is as follows:

> "Cluster of buildings forming a mill or manufacturing establishment (it being understood that dwellings and barns, even if occupied in connection with such mill or manufacturing establishment must be regarded as exposures thereto)."

This rule is what Wooley referred to in connection with rule No. 20 (A) found at page 12 of

Tariff Rules in defendants' Exhibit 18, which relates to blanket policies.

On page 31 of their brief we are covertly accused of switching our position. The witness Veatch had always considered this insurance as specific insurance. Beginning at the bottom of page 87 he testified as follows:

> "Q. And following those instructions, do you know of any way that you could write the two risks under one coverage, and still adhere to the instructions and rates? I believe you testified on the former trial that there is none, did you not?
>
> A. That there was not what?
>
> Q. That you knew of no way, except by the reduced rate average clause?
>
> A. Yes, the reduced rate average.
>
> Q. That is the only way they could be covered under one coverage?
>
> A. If they were two buildings that would be true, yes.
>
> Q. Just as the rate stands, a 2.50 rate on the vinegar factory and a 2.45 on the storage shed, applying those rates, there is no way except by using the reduced average clause and applying the higher rate, there is no way by which you could write them under one coverage?
>
> A. I still don't see why the specific insurance that I wrote on there couldn't be written. I still can't grasp that as well as the blanket coverage.
>
> Q. How did you apply the rates in cover-

ing 244, and the building known as 240, how under one rate and covering them both what rate did you use?

MR. MOORE: Mr. Davis, I would ask you to reform your question; there was no building known as 240.

MR. DAVIS: I will use it in the sense that he used it.

WITNESS: My impression was that the form that we used on those policies, where it says on there 'additions communicating and in contact therewith' covered it."

We never have entertained any other thought than that the insurance in controversy is specific insurance upon vinegar and vinegar stock wherever located in the plant. That this was the intention of the witness Veatch when he wrote these policies in controversy is disclosed beyond any doubt by his cross-examination found in the transcript at pages 86-92 inclusive.

It may be, as ruled by the trial court (Trans. pages 96-97), that we could not have shown this intention of the witness, Veatch, on direct examination but these statements of his intent were brought out by opposing counsel by his cross examination, and as this evidence of his intention is uncontradicted we submit that plaintiffs in error are bound thereby.

An examination of the transcript preceding page 108 will show that the witness Veatch did not understand the purport of certain questions asked

him by the court, which were intended to disclose how the representatives of the insurance companies, from the reports sent in by Veatch Realty Co., as agents, and which contained the description found on the Sanborn Fire Map, could know whether the insurance written was upon the entire plant as a whole or upon the south part of the building.

Observing this, and feeling that the witness Veatch did not understand the scope of the questions asked by the court, we asked him the question found at page 109, and the witness readily answered:

"The rate book would indicate that."

Now our purpose in using the expression "Blanket Policy" was to call to the attention of the witness a policy that covered vinegar while situated in any part of the plant, and we used the words "Specific Insurance" in that question in the sense of insurance upon vinegar in the "Vinegar Tanks", and the witness at once understood what we were asking, and answered as to his understanding of the matter.

Then it appeared that his Honor, Judge Dietrich, did not understand our question, and the witness' answer, and he asked further questions of the witness, beginning on page 111, and at page 112 the witness Veatch says:

"Judge those forms, I don't know how I

could make it any plainer than they read themselves."

Then the court asks another question, and the witness replies:

"The form of the policy reads, 'and its additions, communicating or in contact therewith.'

THE COURT: Isn't that true also of the 240 policy?

A. Yes, sir, the only way they could get at that would be by reference to *their rate book, that says line* 3, *Tank Sheds.*"

Witness here refers to the reference in the policies written on vinegar in the "Vinegar Tanks" at the 2.45 rate.

The last paragraph of the brief of the plaintiffs in error is unwarranted, either as a statement of fact or as a conclusion of fact from the evidence adduced upon the trial of the cause.

There is not a scintilla of evidence to show that any person at any time connected with these transactions of insurance, evidenced by the two policies before the court, ever considered the premises of Leo Brothers Company manufacturing plant as comprising two buildings. But the evidence does show, without any contradiction, that every person connected with the making of the Sanborn Map, and with the fixing of specific rates upon this property, comprising the manufacturing plant of Leo Brothers Company, considered it but one building,

and it is so designated on the Sanborn Map. It is so delineated on the Sanborn Map. Its physical connection is shown conclusively by the uncontradicted testimony of the witness Kimberling, whose evidence is found in the Transcript of Record beginning on page 115 and ending on page 121, and its connection by a common use is shown by the uncontradicted testimony of the witness Veatch throughout the entire transcript.

Then again, the use of the number 240 as descriptive of that part of the building designated on the Sanborn Map as "Vinegar Tanks" was never known to or used by any of the agents of the plaintiffs in error, other than by the witness Veatch, who used it, not as agent of the companies, but as agent of the insured for his own convenience, in cancelling insurance written on the vinegar in the "vinegar tanks" at the special rate of 2.45.

The intent of the witness Veatch to cover vinegar and vinegar stock located at any place within the building in which is located the plant of defendant in error, is shown repeatedly and conclusively time and again at pages 86 to 92 inclusive of the transcript of the record. This evidence of his intent, and understanding of the scope of the policies as written was brought out by the counsel for the appellants in error on cross examination. There is no evidence that any other agent or representative of the plaintiffs in error

had any other understanding than that these policies were to cover vinegar and vinegar stock located in any part of the building upon the premises of the defendant in error.

The only basis that counsel have for making this statement is the mere inference that the representatives of the plaintiffs in error might have understood that the premises of the defendant in error consisted of two separate and distinct buildings and comprised two separate and distinct risks.

But such inferences can never be made to subserve the primary functions of evidence, and we respectfully submit that there is not a scintilla of evidence in this record, other than the fact that a special rate of 2.45 was made upon the "vinegar tanks" and contents when the contracts of insurance were limited to the tanks and contents, to support the contention of counsel for plaintiffs in error.

Taken literally the policies cover vinegar and vinegar stock in any and every part of the building in the manufacturing plant of defendant in error.

It was the understanding of Veatch that such was the effect of the coverage clauses of the policies, and there is no evidence that the managing agents of the appellants in error ever entertained

a different understanding.

The appellants in error are not injured because under the contention of counsel the insurance would have been acceptable if it had been written at the lesser rate.

We therefore most respectfully submit that the Judgment should be affirmed.

FRANK L. MOORE,

For Defendant in Error.